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Supreme Court, U.S.
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No. 88-

IN THE

Supreme Court of the United States

October Term, 1988

THOMAS E. BATES,

Petitioner,

v.

TENNESSEE VALLEY AUTHORITY AND
ORVIS ENGELSTAD, DIRECTOR, DIVISION
OF AGRICULTURAL DEVELOPMENT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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March 15, 1989

QUESTIONS PRESENTED

1. Whether in view of the 1966 Amendments to Rule 15(c), this Court's decision involving private party litigation in *Schiavone v. Fortune*, 477 U.S. 21, 106 S. Ct. 2379 (1986) should be applied to foreclose amendments in litigation against the federal government which are timely filed but mistakenly name the wrong federal entity.

2. Whether the permissive language "as appropriate" in 42 U.S.C. § 2000e-16(c) precludes naming the Tennessee Valley Authority as an entity pursuant to its corporate status under 16 U.S.C. § 831c(b).

PARTIES TO THE PROCEEDING

The petitioner in this application for a writ of certiorari to review dismissal of his Title VII employment discrimination claim is Thomas E. Bates. The respondents are the Tennessee Valley Authority, a federal corporation, and Orvis Engelstad.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner requests that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above proceedings on August 10, 1988, and for which Rehearing was denied on December 21, 1988

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 851 F.2d 1366 (11th Cir. 1988) and is reprinted in the appendix hereto, p. A6, *infra*. The opinion of the United States District

Court for the Northern District of Alabama was not reported. The opinion in *Bates v. Tennessee Valley Authority*, No. 87-AR-5214-NW (N.D. Ala. Oct. 6, 1987) is reprinted in the appendix hereto, p. A12, *infra*.

JURISDICTION

The decision of the Court of Appeals was entered on August 10, 1988, and the request for Rehearing was denied on December 21, 1988. This Court has jurisdiction to review the decision of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Rules 15(c) and 4(j) of the Federal Rules of Civil Procedure, Title VII of the Civil Rights Act of 1964, Section 717(c), as amended, 42 U.S.C. § 2000e-16(c)(1982) and the enabling legislation for the Tennessee Valley Authority codified in 16 U.S.C. § 831c(b)(1982). The statutes are reprinted in the appendix hereto pp. A2-A5, *infra*.

STATEMENT OF THE CASE

The issues raised in this Petition are of great importance to the hundreds of citizens involved in litigation against the federal government each year. The present case typifies the erroneous and unjustified application of this Court's decision in *Schiavone v. Fortune*, 477 U.S. 21, 106 S. Ct. 2379 (1986) to deny amendments correcting the technical naming of federal entities as parties in timely filed complaints. This mistaken application of *Schiavone* has created a "sporting theory of

justice"[1] resulting in minor pleading errors depriving citizens with legitimate claims of their day in court.

The harsh results of these cases ultimately involve the refusal to permit a Rule 15(c) amendment changing the named entity in claims filed against the federal government. In each case the claimants successfully cleared all the hurdles of the administrative process during which the involved federal agency acquired full knowledge of the claim being presented. In each instance, the claims had been thoroughly investigated by the government agency and a written report and recommendation prepared. After exhausting these administrative remedies the claimants filed timely complaints which mistakenly named the wrong federal official or entity as defendant. The aggrieved claimants then sought to amend the complaints to add the technically designated federal defendant.

After the *Schiavone* decision the lower courts have consistently misinterpreted and erroneously extended the decision to refuse these technical correction amendments in cases strictly involving the federal government as a defendant. As a result the complaints, although filed in a timely fashion, are repeatedly dismissed for failure to name the technically designated federal defendant. These results are an unintended extension of this Court's holding in *Schiavone* and a complete frustration of the curative action taken in 1966 to amend Rule 15(c) to avoid this specific result.

To a lesser extent the case is also important to that component of employees that are involved in Title VII litigation

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1. *Schiavone*, 477 U.S. 21, 33, 106 S. Ct. 2379, 2386 (Stevens, J., dissenting).

with TVA. Based upon the clear language of the corporate endowment granted to TVA, and codified in 16 U.S.C. § 831c(b), it should be permissible to name the federal corporate entity in compliance with the statutory requirement under 42 U.S.C. § 2000e-16(c) requiring the naming of the "head of the department, agency, or unit, *as appropriate*, [to] be the defendant."

The facts of Petitioner's case are undisputed. Petitioner is a white, male that was employed by the Agricultural Research Branch, Division of Agricultural Development, within the Tennessee Valley Authority ("TVA"). As a result of a series of job reclassifications, Petitioner claimed that he was discriminated against on the basis of race when a similarly situated black, male employee was promoted. In 1983, a formal administrative claim against "Orvis Engelstad"[2] was filed claiming discrimination under Title VII.

A. Administrative Proceedings

Petitioner commenced timely administrative proceedings in furtherance of his claim of discrimination in 1983 alleging that he had been subject to racial discrimination resulting from TVA's failure to reclassify him when a similarly situated black employee was promoted. During the nearly four years that followed, Petitioner complied with every request for information and meticulously followed all of Tennessee Valley Authority's internal administration procedures. Throughout all of the internal proceedings the administrative

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2. Orvis Engelstad was listed throughout the administrative proceedings as the "Alleged Discriminating Official(s)". Mr. Engelstad held the position of Director, Division of Agricultural Development, Tennessee Valley Authority.

reports and forms the "Involved Unit" was listed as "Agricultural Research Branch, Division of Agricultural Development and "Orvis Engelstad" was named as the "Alleged Discriminating Official(s)".

The Tennessee Valley Authority was intimately familiar with Petitioner's claims having conducted an extensive investigation. A TVA employee was assigned to handle the background investigation which culminated in the preparation and filing of a multi-volume report. The investigation included interviewing witnesses, obtaining signed statements, collecting numerous documents involving Petitioner's employment with TVA and several conferences. Importantly, Petitioner was never advised throughout this administrative process that it was necessary to name the individual board members of TVA as parties to the proceedings. The names of the board members do not appear in any of the administrative documents generated by TVA's investigation and never appeared in any of the notices or correspondence received during the two years of TVA internal processing. After TVA's denial of his internal administrative claim, Petitioner pursued his claim to the Equal Employment Opportunity Commission.

B. Denial Notice And Instructions

On April 22, 1987, Petitioner received notice of the final action by the EEOC denying his administrative appeal against TVA. The notice received by Petitioner advised him of his right to commence a civil action in United States District Court. Petitioner, while provided with some cautionary language in the notice, was never advised that the only proper parties that could be named in the proceeding were the board members of TVA nor that he would prohibited from

proceeding against the same entities which had repeatedly been listed in the administrative proceedings.

Petitioner timely filed his complaint within the thirty-day filing period of Section 717(c) of Title VII, 42 U.S.C. § 2000e-16(c) alleging employment discrimination under Title VII.[3] The complaint named the same individual who had been listed in all previous administrative proceedings during the preceding four years. As a precautionary matter the "Tennessee Valley Authority" was also named since this was the employing entity. A copy of the summons and complaint was mailed pursuant to Rule 4 on May 29, 1987, and received by the TVA business office on June 2, 1987. Service on the U.S. Attorney was perfected on August 17, 1987. Both aspects of service were completed within the 120-day service requirement of Rule 4(j) of the Federal Rules of Civil Procedure.

C. Decision Of The District Court

More than sixty days after receiving service, TVA filed a motion for summary judgment charging that the "proper party" (in this case the TVA board of directors) had not been technically named within the 30-day period stated under Section 2000e-16(c). Petitioner immediately sought to amend his complaint under Rule 15(a) of the Federal Rules of Civil Procedure to add the individual board members.

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3. Petitioner's counsel was first contacted about filing the appeal on May 19, 1987. The federal complaint was drafted the same day local counsel was retained and mailed to the local satellite office of the Clerk for the Northern District of Alabama some forty-five miles distant. The timely complaint was filed by the Clerk two days later on May 22, 1987. The summons and complaint after being filed were returned by postal mail to Petitioner's counsel to perfect service of process.

On October 6, 1987, the district court disallowed the offered amendment and granted TVA's summary judgment request. The district court relying on this Court's decision in *Schiavone v. Fortune*, 477 U.S. 21, 106 S. Ct. 2379 (1986) held that although the lawsuit was timely commenced the amendment naming the TVA Board of Directors to correct the technical defect was untimely since Petitioner had failed to serve board of director members within the 30-day period that expired on May 22, 1987.

D. Decision Of The Court Of Appeals

On October 15, 1987, Petitioner appealed the district court's dismissal of his case. On August 10, 1988, the Court of Appeals for the Eleventh Circuit affirmed the denial of Petitioner's offered amendment. The Court of Appeals held that although *Schiavone* did not involve litigation with the federal government the decision clearly required that the United States Attorney must be served within the applicable limitations period in order to satisfy the requirements of Rule 15(c).

On September 19, 1988, the Court of Appeals directed TVA to respond to issues raised in the petition for Rehearing.[4] After considering these additional arguments the

4. Petitioner's request for Rehearing included those arguments covered in detail during oral arguments before the Panel which were not addressed by the Court of Appeals' written opinion including the historical basis for the 1966 amendment to Rule 15(c) which provided a special procedure for amending actions involving the federal government as well as the specific corporate status for lawsuits granted to TVA in 16 U.S.C. § 831c(b).

Counsel for TVA has attempted to characterize these issues as untimely. This commentary fails to acknowledge the substantive effect this

Court of Appeals denied Rehearing on December 21, 1988.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The questions presented in this Petition fall within two categories of "special and important reasons" for granting certiorari. R. Stern, E. Gressman & S. Shapiro, SUPREME COURT PRACTICE 194 (6th ed. 1986); Sup. Ct. R. 17.1. First, the proper application of Rule 15(c) to actions involving the federal government as a defendant as well as the status of TVA as a corporate entity are significant questions of federal law which have not been settled by this Court. Importantly, the procedural aspects of the Rule 15(c) question is a recurring problem affecting hundreds of claimants each year. The Court should also consider granting the petition due to the conflict between the Circuit Courts of Appeals. While some Circuits have erroneously extended *Schiavone* to litigation involving federal defendants others have devised ways of avoiding the inequitable consequences by finding nuances where none exist. This Court should exercise its supervisory authority to issue a uniform rule and clarify the existing confusion.

Court's denial of certiorari in *Gonzales v. Secretary of the Air Force*, 824 F.2d 392 (5th Cir. 1987), *cert. denied*, ___ U.S.___, 108 S. Ct. 1245 (1988) had on some of the arguments originally raised in appellant's brief.

In oral argument before the Court of Appeals, Petitioner refined the issues to exclude those mooted by *Gonzales*. Petitioner has continuously maintained throughout oral argument and in his Rehearing request before the lower court that *Schiavone* should not be extended to actions involving the federal government and that 16 U.S.C. § 831c(b) permits TVA being sued in its corporate capacity under Title VII. It is absolutely incorrect that assert that these issues are being raised before this Court for the first time.

I

CERTIORARI SHOULD BE GRANTED TO REVIEW THE ERRONEOUS APPLICATION OF *SCHIAVONE* TO CASES INVOLVING THE FEDERAL GOVERNMENT.

The Court in its 6-3 decision[5] in *Schiavone* addressed the requirements for relation back of an amended pleading under Rule 15(c) in actions involving private litigants. The Court held that a plaintiff must satisfy four requirements under Rule 15(c) to permit such an amendment:

> (1) [T]he basic claim must have arisen out of the conduct set fort in the original pleading;
>
> (2) [T]he party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense;
>
> (3) [T]he party must or should have known that, but for a mistake concerning identify, the action would have been brought against it; and
>
> (4) [T]he second and third requirements must have been fulfilled within the prescribed limitations period.

477 U.S. at 29, 106 S. Ct. at 2384. This Petitioner squarely

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5. *Schiavone v. Fortune*, 477 U.S. 21, 106 S. Ct. 2379 (1986). Justice Blackmun authored the majority opinion in *Schiavone* which was joined by Justices Brennan, Marshall, Powell, Rehnquist and O'Connor. Justice Stevens filed a dissenting opinion in which Justices Burger and White joined.

raises the issue of whether the *Schiavone* holding should be extended to cases involving federal defendants.[6]

The requirements announced in *Schiavone* were derived from Rule 15(c) which states:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

FED. R. CIV. P. 15(c). Considered within the context of litigation between private parties *Schiavone* is certainly the controlling interpretation of Rule 15(c). There exists on the other hand a different set of requirements - not discussed in *Schiavone* - for litigation involving the federal government. In these proceedings Rule 15(c) diminishes the requirements

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6. This issue is of immense importance to a multitude of citizens filing claims against the federal government each year. Whether or not this Petitioner can adequately articulate the reasons justifying the need for review by this Court, the Court will eventually need to address the issue. Applying *Schiavone* to cases involving the federal government as a defendant as has been done by the lower courts represents the most basic misapplication of a Supreme Court decision in history.

when service has been perfected on the United States Attorney or the Attorney General. This second tier of Rule 15(c) states:

> The delivery or mailing of process to the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

FED. R. CIV. P. 15(c).

The lower courts in choosing the ignore the broad mandate of this special proviso have routinely and erroneously applied *Schiavone* to cases involving the federal government as a defendant.[7]

There is an alarming and increasing number of decisions in which complaints filed within the applicable limitations

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7. Professor Byse in his seminal article on Rule 15(c) reform identified the problem in securing effective, and thorough, appellate consideration of the specific procedural issue contemplated in this Petition when he noted:

> It is to be regretted that none of the courts considered the problem in this manner and it is hoped that when a similar cases arises in the future, the court will feel free to do so. But it must be recognized that the lower federal courts understandably are reluctant to try to second-guess the Supreme Court. Accordingly, it is possible - perhaps one should say, probable - that in deciding future cases of this kind, busy district judges will continue to travel the quick, easy, and safe route of stare decis rather than attempting the more arduous, time-consuming, and risky course of independent analysis. Nor is there any assur-

period have been dismissed for failure to correctly name a specific federal entity. *See Johnson v. U.S. Postal Service*, 861 F.2d 1475 (10th Cir. 1988); *Honeycutt v. Long*, 861 F.2d 146 (5th Cir. 1988); *Brown v. Department of Army*, 854 F.2d 77 (5th Cir. 1988); *Lamb v. U.S. Postal Service*, 852 F.2d 845 (5th Cir. 1988); *Harris v. U.S. Dept. of Transportation*, 843 F.2d 219 (5th Cir. 1988); *Williams v. Army and Air Force Exchange Service*, 830 F.2d 27 (3rd Cir. 1987); *Bell v. Veterans Administration Hospital*, 826 F.2d 357 (5th Cir. 1987); *Gonzales v. Department of the Air Force*, 824 F.2d 392 (5th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 1245 (1988); *Kouchky v. Department of the Navy*, 820 F.2d 300 (9th Cir. 1987); *Vernell v. United States Postal Service*, 819 F.2d 108 (5th Cir. 1987); *Hymen v. Merit Systems Protection Board*, 799 F.2d 1421 (9th Cir. 1986); *Hughes v. U.S. Postal Service*, 700 F. Supp. 779 (S.D.N.Y. 1988); *Morris v. Bonneville Power Adminstration*, 683 F. Supp. 228 (D. Or. 1987); *Lubniewski v. Department of the Navy*, 682 F. Supp. 462 (N.D. Cal. 1988); *Ridgell v. United States Postal Services*, 678 F. Supp. 167 (E.D. Mich. 1987); *Healy v. United States Postal Service*, 677 F. Supp. 1284 (E.D.N.Y. 1987); *Hendrick v. Department of Agricultural Agency*, 677 F. Supp. 465 (W.D. La. 1987); *Drayton v. Veterans Administration*, 654 F. Supp. 558 (S.D.N.Y. 1987); *Stewart v. United States Postal Service*, 649 F. Supp. 1531 (S.D.N.Y. 1986); *Sinichak v. Tennessee Valley Authority*, 650 F. Supp. 310 (M.D. Tenn. 1986); *Fallett v. United States Postal Service*, 644 F. Supp. 625 (N.D. Tex. 1986); *Portis v.*

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ance that appellate - including the Supreme Court - review will be sought or that it would be successful.

Byse, Suing The "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform," 77 HARV. L. REV. 40, 51-52 (1963).

Department of the Navy, 117 F.R.D. 579 (E.D. Va. 1987).

In some cases the mistake in naming the defendant is as practically inconsequential as listing the federal agency as the defendant instead of the agency head even though service was perfected at the same address and the same governmental attorney represented both parties.[8]

This injustice, while predominantly occurring in Title VII cases, also covers the spectrum of litigation against the federal government.[9] In each instance, the formal district court action is merely an extension of the identical claims investigated and determined in the administrative proceedings.

This Court has specifically rejected an approach to the federal civil procedure rules which make pleadings a game of skill in which one misstep may be decisive. *Conley v. Gibson*, 355 U.S. 41, 48, 78 S. Ct. 99 (1957). Consistent with the mandate of Rule 1 that the rules "shall be construed to secure the just, speedy and inexpensive determination of every action," the Court also recognizes that decisions on the merits are not to be avoided on the basis of "mere technicali-

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8. *See Johnson v. United States Postal Service*, 861 F.2d 1475 (10th Cir. 1988)(complaint named "United States Postal Service" - failure to name technically required "Postmaster General."); *Honeycutt v. Long*, 861 F.2d 1346 (5th Cir. 1988)(complaint named "John Long, Major General Commander, Army & Air Force Exchange Service" - failure to name "Secretary of Defense"); *Daly v. United States Department of the Army*, 860 F.2d 591 (3rd Cir. 1988)(complaint named "United States Department of the Army - failure to name "Secretary of the Army").

9. The misapplication of *Schiavone* to effectively preclude judicial consideration of timely filed complaints is not solely restricted to Title VII cases. *See Martin's Food & Liquor, Inc. v. United States Department of Agriculture*, 702 F. Supp. 215 (N.D. Ill. 1988)(7 U.S.C. § 2023); *Vernell v. United States Postal Service*, 819 F.2d 108 (5th Cir. 1987)(28 U.S.C. § 2401); *Hughes v. United States*, 701 F.2d 56 (7th Cir.

ties." *Foman v. Davis*, 371 U.S. 178,181, 83 S. Ct. 227, 229 (1962). Granting certiorari in this case will permit the Court to rectify a very fundamental, yet mistaken, interpretation of *Schiavone* when applied to litigation involving the federal government.[10]

A. The Application Of *Schiavone* To Cases Involving The Federal Government Conflicts With The Intent Of The 1966 Amendments To Rule 15(c).

As originally promulgated, Rule 15(c) consisted of what is now the first sentence. The Rule provided:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

FED. R. CIV. P. 15(c)(pre-1966). This provision led to some extremely harsh results when claimants, confronted with the shortest limitation periods in civil practice, mistakenly named the wrong federal entity as a defendant.

1982)(28 U.S.C. § 2671 *et seq.*); *Lofton v. Heckler*, 781 F.2d 1390 (9th Cir. 1986)(5 U.S.C. § 7703).

10. The Court should not allow the significance of the denial of certiorari in *Gonzales* to be overplayed. The petition in *Gonzales* dealt chiefly with claims for equitable tolling of the limitations period. The petition did not address the significance of the historical development of the federal tier of Rule 15(c) nor the proper construction of this rule. Given the immense importance of the 1966 amendments to Rule 15(c) to correct exactly the problem confronted in this case, the present Petition is apparently the first to exhaustively examine the purpose of the 1966 rule changes and the historical rationale leading to the amendments.

The most infamous of these cases were reported in successive volumes of the *Federal Supplement*. *Cunningham v. United States*, 199 F. Supp. 541 (W.D. Mo. 1959); *Sandridge v. Folsom, Secretary of Health, Educ. & Welfare*, 200 F. Supp. 25 (M.D. Tenn. 1959); *Hall v. Department of Health, Educ. & Welfare*, 199 F. Supp. 833 (S.D. Tex. 1960); *Cohn v. Federal Security Administration*, 199 F. Supp. 884 (W.D.N.Y. 1961).

These four cases, while perhaps unnoticed by many, caught the attention of then Harvard law professor Clark Byse. Shocked by the apparent injustices resulting from naming the "wrong" defendant, Professor Byse closely examined each of the four cases, analyzed Supreme Court precedents and presented specific proposals for reform.[11] Byse, *Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform*, 77 HARV. L. REV. 40 (1963).

This historical retrospective is especially important to the present Petition. In examining the seminal cases that led to Rule 15(c) reform, the parallels to the present case are most apparent.

Case[12]	Limitations Period Expiration	Date of Service U.S. Attorney
Cunningham	Oct. 6, 1958	Oct. 7, 1958

11. Professor Byse commented that the "[f]our decisions ... reached results so at odds with my sense of justice as to provoke this attempt to suggest a remedy." 77 HARV. L. REV. 40 (1963).

12. Petitioner's counsel was unable to ascertain the correct date of service on the U.S. Attorney with respect to the limitations period in *Cohn*.

Hall	Nov. 1958	Mar. 25, 1959
Sandridge	Aug. 19, 1958	Sept. 5, 1958
Bates	May 22, 1987	Aug. 17, 1987

In *Sandridge*, *Hall* and *Cohn* requests to amend the pleadings to name the technically required defendant were filed after the statutory limitation period had expired.

Professor Byse proposed that Rule 21 be amended to include the following language:

> *Relation Back In Actions Against the United States, Its Agencies or Officers*. Whenever, in any action against the United States, an agency thereof, or an officer thereof in his official capacity, a copy of the summons and of the complaint shall have been delivered or sent, in compliance or attempted compliance with Rule 4(d)(4) or (5), to the United States attorney for the district in which the action is brought, or to a person designated by him, or to the Attorney General of the United States, or to any agency which or officer who would have have been a proper defendant, if named, the addition or replacement of a party defendant relates back to the date of the commencement of the action.

Id. at 55-56. The linchpin of Professor Byse's proposal was service:

> The heart of both of the proposals presented is the

> provision that, if process has been *served* upon the United States attorney, the Attorney General of the United States, or an agency or official who would have been a proper defendant if named, the amendment bringing in the proper defendant relates back to the commencement of the action. Such *service* affords some responsible official of the Government timely notice that the plaintiff is seeking judicial review.

Id. at 58 (emphasis added).

Professor Byse's proposal did not go unnoticed. In 1966, Rule 15(c) was significantly changed. Not only was the Rule clarified as to when an amendment of the pleading changing the party against whom a claim is asserted related back - the private litigant aspect considered in *Schiavone* - but also Professor Byse's proposal was implemented. The "federal" tier of Rule 15(c) was added which stated:

> The delivery or mailing of process to the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

FED. R. CIV. P. 15(c)(1966).

Throughout its commentary the Advisory Committee proposing this change was conversant with the inequities of

Cohn, *Cunningham*, *Hall* and *Sandridge*. The Advisory Committee left no doubt that the proposed revision would not be a problem in these cases. Noting the linchpin of effective service instead of notice, the Committee observed:

> [T]he government was put on notice of the claim within the stated period - in the particular instances, by means of the initial delivery of process to a responsible government office (see Rule 4(d)(4) and (5)). In these circumstances, characterization of the amendment as a new proceeding is not responsive to reality, but is merely question-begging; and to deny relation back is to defeat unjustly the claimant's opportunity to prove his case.

Advisory Committee on Civil Rules. See 39 F.R.D. 82, 83 (1966). As Justice Blackmun remarked in *Schiavone*, the construction given by the Advisory Committee is "of weight." *Id.* at 2385 (quoting *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444, 66 S. Ct. 242, 245 (1946)).

At least one commentator has acknowledged the significance of *service* in the Rule 15(c) revision noting:

> The last sentence of Rule 15(c), which was added in 1966 ... is intended to avoid the harsh results that occurred prior to the amendment. It establishes an irrebuttable presumption that if proper service has been made on the United States attorney, or his designee, or the Attorney General, or an agency or officer who would have been a proper defendant if named, then the requirements set forth in clauses (1) and (2) of Rule 15(c) for the relation back of an amendment

> changing a party are to be deemed satisfied.... The 1966 amendment should have the desirable effect of facilitating a citizen's suit against his sovereign by eliminating an unnecessary trap for the unwary.

6 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 1502 p. 529 (1983).

Analyzed against this historic backdrop the Court's decision in *Schiavone* applying the non-federal tier of Rule 15(c) should not be considered applicable in cases involving the federal government. Instead of testing the allowance of an amendment correcting the technical designation of a federal defendant by the linchpin of "notice", it should be apparent that the drafters envisioned the more correct test of whether service is perfected in accordance with Rule 4.

Fundamentally, the Court's decision in *Schiavone* does not address how Rule 15(c) applies to cases involving the federal government. Instead, it should be obvious from a historical perspective that the special requirements set forth in *Schiavone* would negate - even contradict - the ameliorative changes made in 1966. If the *Schiavone* holding is extended to litigation against the federal government, as it has been by the lower courts, nothing was changed by the 1966 amendments and the results in *Cohn*, *Cunningham*, *Sandridge*, and *Hall* would remain as unjust and inequitable today as in 1960.[13]

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13. One article has noted that the "four social security cases that provoked Professor Byse to urge reform, and that prompted revision of Rule 15(c), almost certainly would come out the same way today under the *Schiavone* Court's construction of Rule 15(c)." Brussack, *Outrageous Fortune: The Case for Amending Rule 15(c) Again*, 61 S. CAL. L. REV. 671, 672 (1988).

The Court should perceive that this was not the intent of the 1966 amendment. Granting certiorari will permit to the Court to more thoroughly analyze this separate - and distinct - aspect of Rule 15(c) and the adverse effect it has on hundreds of litigants each year.

B. The Application Of *Schiavone* To Cases Involving The Federal Government Conflicts With The Clear Language Of Rule 15(c).

Although the fundamental error of extending *Schiavone* to federal cases in view of the historical development of Rule 15(c) is the predominant reason justifying certiorari, the same conclusion is merited by construing the language of the rule. The Court has often admonished that the federal rules are not to be given a narrow and formalistic construction. Rather, they should be interpreted with a view toward allowing a hearing on the merits. *See, e.g. Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373, 86 S. Ct. 845, 851 (1966).

Perfecting service in accordance with Rule 4 has a dramatic effect on the technical wording of Rule 15(c). Eliminating the subsidiary requirements of paragraphs (1) and (2), Rule 15(c) would provide:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against

> him, the party to be brought in by amendment ~~(1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.~~

Standing alone in this fashion the final requirement stated in *Schiavone* - notice within the prescribed limitations period - becomes superfluent. Each of the requisites of the "federal" tier of Rule 15(c) is met by perfecting service. Nothing within the second paragraph of Rule 15(c) mandates that this service take place before the expiration of the proscribed limitations period. Given this misapplication of *Schiavone* based upon a false interpretation of the "federal" tier, this Court should review the decision below.

C. The Rationale Of *Schiavone* Does Not Apply To Cases Involving The Federal Government.

The Court in *Schiavone* reviewed a case that was vastly dissimilar to any of the cases that involve the federal government as a defendant. It is difficult, if not impossible, to extend the rationale noted by the Court in *Schiavone* to litigation against the federal government.

The majority in *Schiavone* concluded that notice within the limitations period is the "linchpin" of Rule 15(c). *Schiavone* at 2385. The underlying facts in *Schiavone* established that the first notice defendant Time had of plaintiff's complaint was with the filing of the lawsuit some two months

after the expiration of the limitations period and more than fourteen months after the tortuous conduct. *Id.* at 2385.

The factual constraints of the present case, as repeated in nearly every case in which *Schiavone* has been misapplied, belay any question about knowledge of the underlying claim. In the present case TVA participated in adversarial administrative proceedings for three years before the commencement of suit in district court. Further, even if the TVA board of directors had been technically named, they probably would never have received notice of the filing. Whether TVA or the individual board members were named, the same official address would be used to perfect service, the same employees of TVA would review the complaint, the same TVA legal representative would appear as counsel, and TVA would pay any judgment.

Unless the Court permits these legal fictions to predominate over reason and reality, the requirements of *Schiavone* should not be applied. The Court should certainly recognize that petitioner did not abuse the limitations period. Instead, his only error, albeit a technical and fatal one according to the lower court, was to not recognize that the "Alleged Discriminating Official(s)" suddenly changed from "Orvis Engelstad" to the TVA board of directors.

The present case apparently falls directly within the "scrivener's" error forecast by Justice Stevens in *Schiavone*.[14] The Court should grant certiorari to review whether extension of *Schiavone* is justifiable in this context.

D. Review is Warranted Because Of A Conflict Among The Lower Courts

The lower courts have developed interesting holdings to avoid the inequitable results of *Schiavone*. Either these cases are conflicting with how the Court would apply Rule 15(c) to litigation against the government or they provide additional impetus justifying certiorari.[15]

One example of this is *Mondy v. Secretary of the Army*, 845 F.2d 1051 (D.C. Cir. 1988) in which the appellate court engaged in the fiction that *Schiavone* would permit additional time for processing service when the United States marshal is involved. The court in *Mondy* permitted service four months after the limitations period had expired to relate back to save the offered amendment. In essence the court avoided *Schiavone* by finding that reliance on the United States marshal to perfect service on the United States attorney would toll the Rule 15(c) time period.

Another example of indirect refusal to follow *Schiavone* is *Cupp v. Veterans Administration Hospital*, 677 F. Supp. 1018 (N.D. Cal. 1987). The district court in this case held that the act of attaching a copy of the administrative decision to the complaint was sufficient to satisfy the statutory requirement even though the complaint failed to name the administrator of the Veterans Administration. The Ninth Circuit has previously confirmed this technique as a means to

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15. In presenting this argument, Petitioner does not represent that this rises to the level of "conflict between the Circuits" as envisioned by Supreme Court Rule 17.1. Instead, the discussion is presented to indicate the character of the problem posed by Rule 15(c) and how the lower courts are circumventing the *Schiavone* holding.

avoid dismissal. *Rice v. Hamilton Air Force Base Commissary*, 720 F.2d 1081 (9th Cir. 1983).

These cases are reflective of the growing dissatisfaction the lower courts have in confronting Rule 15(c) and *Schiavone*.[16] At the very least, the Court should grant certiorari to once and for all resolve the correct application of Rule 15(c) to cases involving federal defendants. The harsh and unintended consequences certainly justify review by this Court.

II

CERTIORARI SHOULD BE GRANTED TO REVIEW THE STATUS OF TVA AS A CORPORATE ENTITY UNDER TITLE VII.

This Court should grant the writ of certiorari in order to resolve a fundamental misinterpretation of the Title VII filing requirements as they relate to 16 U.S.C. § 831c(b). The lower court in its application of Section 2000e-16(c) judicially added a filing requirement that not only fails to exist but also overlooked the clear language of Section 831c(b). In

16. In the aftermath of Schiavone several appellate decisions have voiced vigorous dissent over the application of the decision to cases against the federal government. *See Johnson v. U.S. Postal Service*, 861 F.2d 1475 (10th Cir. 1988)(McKay, J. dissenting); *Honeycutt v. Long*, 861 F.2d 1346 (5th Cir. 1988)(Brown, J. dissenting noting "[t]he Court over my somewhat spirited defense, has ruled in *Gonzales v. Secretary of Air Force*, 824 F.2d at 395; therefore as a loyal trooper I am bound although still convinced of the error of our - and with utmost deference, the Supreme Court's - way"); *Gonzales v. Secretary of Air Force* , 824 F.2d 392 (5th Cir. 1987)(Brown, J. dissenting).

doing so, the lower court decision conflicts with other precedents within the Circuit and is contrary to Congressional intent in creating TVA.

In the present case, there is no dispute that Petitioner timely filed his district court action against "TVA." Direct action against the federal government for Title VII employment discrimination is contemplated by Section 2000e-16(c). In relevant part, this statute provides:

> Within thirty days of receipt of notice of final action ... an employee or applicant for employment, if aggrieved by the final disposition of his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, *as appropriate*, shall be the defendant.

42 U.S.C. § 2000e-16(c)(emphasis added).[17] One lower court, noting the permissive phrase "as appropriate", commented on this specific language:

> In enacting the Civil Rights Act, Congress did not intend to have claims of discrimination dismissed on a highly technical construction of the broadly worded provision designating appropriate defendants. In providing that "the head of ... a unit, *as appropriate*, *shall* be the defendant," (emphasis added), Congress indicated that a non-technical, reasonable interpretation should be applied in determining eligible defen-

17. The section of Section 2000e does not specify what is meant by "head", "department", "agency" or "unit". *See generally* 42 U.S. C. § 2000e.

> dants. The use of the words "*as appropriate*" and "*shall*" denote a congressional intent to prescribe a wide selection of jurisdictional defendants. It is the this complete statutory provision that determines the jurisdictional defendants and the words should be given their ordinary meaning. *Burns v. Alcala*, 420 U.S. 575, 580-81, 95 S. Ct. 1180, 1184-85 (1975).

Mondy v. Secretary of the Army, 845 F.2d 1051 (D.C. Cir. 1988)(MacKinnon, J. concurring)(emphasis in original).

The specific language of Section 2000e does not answer who or what entity needs to be named in the Title VII proceeding in district court. For guidance on this issue, courts naturally must examine other federal statutes.

Congress in creating the Tennessee Valley Authority specifically endowed the federal corporation with certain private corporate-like characteristics. One of these included the right to sue and be sued in TVA's corporate name. This Congressional authorization was codified in 16 U.S.C. § 831c(b) which permits:

> Except as otherwise specifically provided in this chapter, the Corporation [Tennessee Valley Authority] -
>
> (a) Shall have succession in its corporate name.
>
> (b) May sue and be sued in its corporate name.

16 U.S.C. § 831c(b).

With the exception of the present case, all other lower

courts which have thoroughly considered Section 831c(b) have consistently held that federal actions can be filed against TVA as a corporate entity.[18] *Peoples National Bank of Huntsville, Alabama v. Meredith*, 812 F.2d 682, 684-85 (11th Cir. 1987)("the doctrine of sovereign immunity does not bar suit against TVA; indeed its enabling act provides that it may sue and be sued in its corporate name"); *Painter v. Tennessee Valley Authority*, 476 F.2d 943, 944 (5th Cir. 1973); *Algerion Blair Industrial Contractors, Inc. v. Tennessee Valley Authority*, 552 F. Supp. 972, 974 (M.D. Ala. 1982)("TVA always has been liable to direct lawsuit like any other litigant"); *Carborundum Company v. Tennessee Valley Authority*, 521 F. Supp. 590, 594 (E.D. Tenn. 1981)("While the Court can take judicial notice that the individual defendants are Directors of the TVA, no cause of action is alleged against them in their individual or official capacity. Moreover, lawsuits involving TVA's activities are to be brought against TVA in its corporate name and not against a director or other official of that agency.").

The uneven application of Section 831c(b) certainly merits review by this Court. Since the Court has not previously reviewed Section 831c(b), granting this Petition will permit review of both this provision as well as the meaning of the phrase "as appropriate" in Section 2000e-16(c).

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18. In proceedings before the Eleventh Circuit, TVA provided a compendium of unreported cases that were represented as addressing this issue. These cases do not consider the permissive language "as appropriate" and apparently reflect little judicial analysis of this issue.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that this Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit.

Dated: March 15, 1989
Florence, Alabama

Respectfully submitted,

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Thomas E. Bates

No. 88-

IN THE

Supreme Court of the United States

October Term, 1988

THOMAS E. BATES,

Petitioner,

v.

TENNESSEE VALLEY AUTHORITY AND
ORVIS ENGELSTAD, DIRECTOR, DIVISION
OF AGRICULTURAL DEVELOPMENT,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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March 15, 1989

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RULE 15(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 15. Amended and Supplemental Pleadings

(c) **Relation Back of Amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

RULE 4(j) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 4. Process

(j) **Summons: Time Limit for Service.** If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

16 U.S.C. § 831c. Corporate powers generally; eminent domain; construction of dams, transmission lines, etc.

Except as otherwise specifically provided in this chapter, the Corporation -

(a) Shall have succession in its corporate name.

(b) May sue and be sued in its corporate name.

(c) May adopt and use a corporate seal, which shall be judicially noticed.

(d) May make contracts, as herein authorized.

(e) May adopt, amend, and repeal bylaws. ....

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, § 717(c), AS AMENDED, 42 § 2000e-16(c)

Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Thomas E. BATES, Plaintiff-Appellant,

v.

TENNESSEE VALLEY AUTHORITY and
Orvis Engelstad, Director, Division
of Agricultural Development, Defendants-Appellees.

No. 87-7626

United States Court of Appeals,
Eleventh Circuit,

Aug. 10, 1988

Appeal from the United States District Court for the Northern District of Alabama.

Before HATCHETT and EDMONDSON, Circuit Judges, and GIBSON, Senior Circuit Judge. [Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation]

HATCHETT, Circuit Judge:

In this Title VII action, the appellant sought to add the proper parties to his lawsuit after the expiration of the limitations period for filing suit. Applying *Schiavone v. Fortune*, 106 S. Ct. 2379 (1987), we affirm the district court's ruling denying the amendment.

FACTS

The appellant, Thomas E. Bates, is an employee of the Tennessee Valley Authority (TVA). Appellee, Engelstad, is the director of the TVA division in which Bates is employed. In 1983, Bated filed suit with the EEOC alleging that TVA and Engelstad discriminated against him on the basis of race. The EEOC denied relief on April 22, 1987, and on May 21, 1987, Bates filed a complaint in the District Court for the Northern District of Alabama against TVA and Engelstad, thereby complying with the statutory requirement that a litigant file a Title VII complaint in the district court within thirty days after the EEOC decision. 42 U.S.C. § 2000e-16(c).

On August 6, 1987, TVA and Engelstad filed motions to dismiss asserting that neither was a "head of the department, agency, or unit . . ." under that portion of 42 U.S.C. § 2000e-16(c) which delineates the proper parties in Title VII actions. On August 17, 1987, Bates filed a motion to amend his complaint to add the proper parties, TVA Board members Charles H. Dean, Jr., and John B. Waters (Board members). On October 6, 1987, the district court dismissed TVA and Engelstad and denied Bates's motion to amend his complaint to add the Board members as defendants. The Board members have not filed any motions or pleadings in this action.

This appeal tests the district court's ruling denying the right to amend and granting dismissal.

DISCUSSION

Motion to Dismiss TVA and Engelstad

The controlling statute in this case is 42 U.S.C. § 2000e-16(c) which states:

> Within thirty days of receipt of notice of final action taken by... the Equal Employment Opportunity Commission..., an employee or applicant for employment...may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Bates filed a complaint naming TVA and Engelstad as defendants within the thirty-day time limit. Neither TVA nor Engelstad, however, fit the statutory requirement that the civil action be against "the head of the department, agency, or unit." The TVA is headed by a three-member board of directors. Accordingly, the district court correctly dismissed TVA and Engelstad because they were not proper parties under 42 U.S.C. § 20003-16(c).

Motion to Add Board Members

Before the district court dismissed TVA and Engelstad, but more than thirty days after receipt of the EEOC notice, Bates moved to add the Board members as proper parties. The district court denied the motion. The decision of the district court denying leave to amend will not be reversed absent an abuse of discretion. *Wright v. Newsome*, 795 F.2d 964, 967 (11th Cir. 1986); *Rhodes v. Amarillo*

Hospital District, 654 F.2d 1148, 1153 (5th Cir. 1981)(binding).

Although the motion to amend came after the thirty-day time limit had expired, the delay was not fatal for jurisdictional purposes. The Supreme Court and this circuit are consistent in holding that the time limitations within Title VII are not jurisdictional. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S. Ct. 1127, 1132, 71 L. Ed.2d 234 (1982); *Ross v. U.S. Postal Service*, 814 F.2d 616 (11th Cir. 1987); *Miller v. Marsh*, 766 F.2d 490 (11th Cir. 1985); *Milam v. United States Postal Service*, 674 F.2d 860 (11th Cir. 1982). *See also Boddy v. Dean*, 821 F.2d 346, 350 (6th Cir. 1987); *Jarrell v. United States Postal Service*, 753 F.2d 1088 (D.C.Cir. 1985); *Martinez v. Orr*, 738 F.2d 1107, 1109 (10th Cir. 1984); *Saltz v. Lehman*, 672 F.2d 207, 208 (D.C.Cir. 1982). Instead of a jurisdictional requirement, the thirty-day time limit is "a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Zipes* 455 U.S. at 393, 102 S. Ct. at 1132. Our holding in this case does not impact upon this longstanding rule.

Although Bates urged relief based on equitable tolling in this court, he did not do so in the district court. In the absence of the equitable tolling issue being properly before this court, the case involves only the right to amend under the circumstances of this case.

The relevant legal requirements for an amendment to a complaint are found in Federal Rule of Civil Procedure 15. Rule 15(c) authorizes amendments which "relate back" to the

original complaint.[1] The four prerequisite to a "relation back" amendment under rule 15(c) are: (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period. *Schiavone v. Fortune*, 477 U.S. 21, 106 S. Ct. 2379, 2384, 91 L. Ed.2d 18 (1986).

The fourth element requires that a court consider whether a party to be added was on notice within the limitations period. In this case, the Board members did not receive notice of Bates's allegations until the thirty-day limitations period had run. Because the second and fourth elements of *Schiavone* went unsatisfied, thereby barring a rule 15(c) relation back amendment, the district court properly denied the motion to amend. *See Gonzales v. Secretary of the Air Force*, 824 F.2d 392, 396 (5th Cir. 1987); *Cooper v. U.S. Postal Service*, 740 F.2d 714, 717 (9th Cir. 1984), *cert. denied*, 471 U.S. 1022, 105 S. Ct. 2034, 85 L. Ed.2d 316 (1985).

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1. Bates also argues that he should be allowed to amend his complaint as a matter of course because the defendants had not yet filed a "responsive pleading." Fed.R.Civ.P. 15(a); *McClellan v. Mississippi Power and Light Co.*, 526 F.2d 870, 873 (5th Cir. 1976), *vacated on other grounds*, 545 F.2d 919 (5th Cir. 1977). We agree that appellee's motion to dismiss was not a responsive pleading under rule 15(a). *McClellan*, 526 F.2d at 872 n. 2. Nevertheless, we will not allow an amendment under 15(a) in direct contradiction of rule 15(c)'s more specific requirement that the amendment "relate back" to the original complaint once the limitations period has run.

Even if Bates had raised equitable tolling, it would have not changed the result in this case. Because the district court correctly denied Bates's motion to add parties, on the basis of *Schiavone*, the issue of equitable tolling was irrelevant. Only with the Board members properly in this case could Bates have benefited from equitable tolling.[2]

Bates also argues that *Schiavone* is inapposite because it did not involve a federal defendant. The second paragraph of rule 15(c) states that the requirement that the proper defendant be on notice before the period of limitation expires is satisfied if the plaintiff serves process on the United States Attorney. We construe this paragraph to mean that a plaintiff must serve the United States Attorney within the applicable limitations period in order to satisfy the requirement that the proper federal defendant be on notice within that period. *See Cooper v. U.S. Postal Service*, 740 F.2d 714, 717 (9th Cir. 1984), *cert. denied*, 471 U.S. 1022, 105 S. Ct. 2034, 85 L. Ed.2d 316 (1985). Because Bates did not serve the United States Attorney until August 17, 1987, well after the thirty-day period had run, rule 15(c) provides no relief.

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2. Bate's claim that the period tolled because appellee's payment of disparate wages is a continuing violation of Title VII is unavailing. A continuing violation tolls the period in which a plaintiff may pursue administrative remedies. The thirty-day time limit for filing court action is tolled only by failure to receive a Right to Sue letter, misrepresentations of the agency, or other administrative obstacles.

Our holding that the district court properly denied amendment renders spurious Bate's argument that only the proper parties (Board members) could raise the statute of limitations bar bringing into issue equitable tolling. Obviously, the Board members will never be parties in this lawsuit. Perhaps, in a new lawsuit the equitable tolling issue may be reached.

Accordingly, the order of the district court is affirmed.

AFFIRMED.

Thomas E. BATES, Plaintiff-Appellant,

v.

TENNESSEE VALLEY AUTHORITY and
Orvis Engelstad, Director, Division
of Agricultural Development, Defendants-Appellees.

No. 87-AR-5214-NW

United States District Court,
Northern District of Alabama,
Northwestern Division

Oct. 06, 1988

Appeals from the United States District Court for the Northern District of Alabama.

Before William M. ACKER, Jr., District Judge.

ACKER, District Judge:

The court has for consideration the alternative motions by defendants Tennessee Valley Authority (TVA) and Orvis Engelstad for a dismissal and for summary judgment. Additionally, the court is presented with plaintiff Thomas E. Bates' motion for leave to amend his complaint. Defendants' motions are due to be granted; plaintiff's motion is due to be denied.

Pertinent Undisputed Facts

On May 22, 1987, plaintiff filed his complaint in this court against TVA under Title VII of the Civil Rights Act of 1964, as amended, and 42 U.S.C. § 1981, claiming that TVA had discriminated against him because of his race. The complaint also named Orvis Engelstad, Director of the Division of Agricultural Development of TVA, as a defendant. Subsequent to the filing of the complaint with the Clerk of this court, the summons and a copy of the complaint were mailed to TVA on May 29, 1987, with receipt by TVA on June 2, 1987.

Prior to filing, Bates pursued his administrative remedies through TVA itself and through the Equal Employment Opportunity Commission (EEOC). The EEOC rendered its final decision on April 17, 1987, concluding that Bates was not a victim of discrimination. That decision was communicated to Bates on or about April 22, 1987.

On August 6, 1987, defendants filed their present motions, contending that a suit under 42 U.S.C. § 2000e-16 against the members of TVA's Board of Directors in their official capacity, and not against TVA as an entity or Engelstad, is plaintiff's exclusive statutory remedy for his claims. On August 17, 1987, plaintiff filed his motion for leave to amend his complaint. He argues that his proposed amendment is necessary in order to clarify the causes of action stated in the original complaint and to add as defendants the members of the Board of Directors of TVA, Charles H. Dean, Jr. and John B. Waters. This would seem to concede that Dean and Waters are necessary parties defendant. The question is "Did Bates get to them in time?"

Conclusions of Law

The disposition of these motions depends upon the resolution of several legal issues: (1) whether TVA and Engelstad are proper defendants in the present action under 42 U.S.C. § 2000e-16(c); (2) whether plaintiff's proposed amendment, if allowed, would relate back to the date of filing of the original complaint, so as to avoid the statutory bar presented by 42 U.S.C. § 2000e-16(c), which requires that employment discrimination actions against the federal government be commenced within 30 days of receipt of a final decision from the EEOC; and (3) whether plaintiff has a separate cause of action against these defendants under 42 U.S.C. § 1981 which would not be barred except by Alabama's six-year statute of limitations.

Title VII Action Against TVA and Engelstad

In authorizing suit against the federal government, 42 U.S.C. § 2000e-16(c) directs in clear and unambiguous language that in a civil action "the head of the department, agency, or unit, as appropriate, shall be the defendant." In accordance with this statutory direction, the "Notice of Right to File a Civil Action," which accompanies final decisions of the EEOC, points out:

> YOU MUST NAME THE APPROPRIATE OFFICIAL AGENCY OR DEPARTMENT HEAD AS THE DEFENDANT. Rule 25(d)(2) of the Federal Rules of Civil Procedure provides that you may describe the defendant by official title rather than by name. Failure to provide the NAME OR OFFICIAL TITLE of the agency

> head or, where appropriate, the department head, may result in the loss of any judicial redress to which you are entitled. (Please note: For this purpose, Department means the overall national organization, such as the now defunct Department of Health, Education and Welfare, not the local administrative department where you might work.) You must be sure that the proper defendant is named when you file your civil action.

Affidavit of Thomas F. Fine (Exhibit 1) (emphasis in original).

Case Law has further emphasized that an agency head is the only proper Title VII defendant under § 2000e-16(c). *Canino v. United States Equal Employment Opportunity Commission*, 707 F.2d 468, 472 (11th Cir. 1983); *Brickley v. Tennessee Valley Authority*, No. 77-M-0580, slip op. at 2 (N.D. Ala. 1977). TVA is under the direction of a three-member Board of Directors, as 16 U.S.C. § 831 makes clear; courts have unhesitatingly relied upon this provision in finding that the "head" of TVA is its Board of Directors. *Bell v. Tennessee Valley Authority*, Nos. 77-P-0240-NE and 77-P-0418-NE, slip op. at 3 (N.D. Ala. 1977); *Horton v. Tennessee Valley Authority*, No. 79-W-5028, slip. op. at 3 (N.D. Ala. 1980). Accordingly, as the *Bell* court explicitly pointed out, only TVA's named directors are proper defendants. Neither TVA as a corporate entity nor other supervisory personnel may be properly named as defendants. *Brickley* at 2. It is clear, then, that plaintiff's original complaint did not name the proper defendants for his Title VII action.

Relation Back of Plaintiff's Proposed Amendment

Plaintiff seeks to avoid dismissal of his Title VII claims by the expedient of amending his complaint to name the proper defendants, the members of TVA's Board of Directors. Plaintiff asserts that the date of any such amendment should relate back to the date of filing of his original complaint, under Rule 15(c), F.R.Civ.P., so that his claims against TVA's Board members will be deemed timely filed. However, in light of the Supreme Court's holding in *Schiavone v. Fortune,* _____ U.S. _____, 106 S. Ct. 2379 (1986), any such amendment would not relate back in this case. In *Schiavone,* plaintiff filed his libel suit several days prior to the expiration of the statutory period for filing suit. He named the publication containing the allegedly libelous article, Fortune, as defendant, and attempted to serve process several days later, by which time the statutory period for commencing the action had run. Service of process was refused because "Fortune" was, in fact, only a trademark of Time, Incorporated, which was the proper defendant. Several weeks thereafter, the plaintiff amended his complaint to include Time, Incorporated. In holding that the date of the amendment did not relate back to the date of filing of the original complaint, the Supreme Court articulated four factors, all of which must be satisfied, if relation back is to take place:

> (1) the basic claim must have arisen out of the conduct set forth in the original pleading;
>
> (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense;

(3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and

(4) the second and third requirements must have been fulfilled within the prescribed limitations period.

106 S. Ct. at 2384.

The Court pointed out that the notice thus required in *Schiavone* had not been given until after the expiration of the statutory period for commencing suit; therefore, the necessary knowledge did not come into being until after the expiration of the statutory period. Noting that Rule 15(c), F.R.Civ.P., refers to the period provided by law for "commencing" the action, and that Rule 3, F.R.Civ.P., provides that suit is "commenced by filing a complaint," the Court stated:

> We are not inclined, either, to temper the plain meaning of the language [of Rule 15(c)] by engrafting upon it an extension of the limitations period equal to the asserted reasonable time, inferred from Rule 4, for the service of a timely filed complaint.

106 S. Ct. at 2385.

Accordingly, the amendment in *Schiavone* did not relate back to the date of original filing, and the dismissal of the action was affirmed.

The Fifth Circuit very recently found *Schiavone* dispositive in a case remarkably similar to the case at bar. In *Gonzales v. Secretary of the Air Force,* 824 F.2d 392 (1987),

that court held that an amendment in a Title VII suit naming the Secretary of the Air Force as a defendant did not relate back to the date of the original complaint, where the Department of the Air Force was named as the sole defendant originally. In *Gonzales,* as in the present case, the plaintiff had timely filed his complaint but had not effected service of process until after the expiration of the thirty-day period allowed by § 2000e-16(c). Since neither the Department nor the Secretary had received notice during the thirty-day period, in light of *Schiavone,* the Fifth Circuit held that the plaintiff's amendment did not relate back and the district court's dismissal of the action was affirmed.

The Eleventh Circuit has not yet ruled on this precise issue. However, this court finds the reasoning of the Fifth Circuit in *Gonzales* persuasive, and, applying *Schiavone,* finds that any amendment by the plaintiff in the present case would not relate back to the date of the original complaint. Accordingly, plaintiff's motion to amend is due to be denied because it would not accomplish its only real purpose.

The Supreme Court has cautioned against highly technical readings of the provisions of Title VII. *See Zipes v. TransWorld Airlines, Inc.,* 455 U.S. 385, 102 S. Ct. 1127 (1982); *Love v. The Pullman Co.,* 404 U.S. 522, 92 S. Ct. 616 (1972). However, this admonition does not change the result in the present case. In *Baldwin County Welcome Center v. Brown,* after pointing out that there is "no satisfactory basis for giving Title VII actions a special status under the Rules of Civil Procedure," the Court went on to say:

> Procedural requirements established by Congress for gaining access to the federal courts are not to be dis-

> regarded by courts out of a vague sympathy for particular litigants. As we stated in *Mohasco Corp. v. Silver*, "[i]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of even-handed administration of the law."

466 U.S. 147, 153, 104, S. Ct. 1723, 1726 (1984) (per curiam) (citations omitted.)

The concern of the Court in *Baldwin County* is particularly apt in the present case, where the previously mentioned "Notice of Right to File a Civil Action" attached to the EEOC's final decision and given to the plaintiff, emphasizes not only that the proper defendant must be named but also that any civil action must be filed within 30 days from the date of receipt of the EEOC decision. (Affidavit of Thomas F. Fine, Exhibit 1).

Section 1981 Claim

It is by now well established that Title VII provides the exclusive judicial remedy for discrimination claims of federal employees. There is an abundance of cases like the present one wherein plaintiffs have claimed violations of both Title VII and § 1981. Equally abundant are the dismissals of the § 1981 claims, with consistent findings by the courts that Title VII is the exclusive remedy. *See, e.g., Brown v. General Services Administration*, 425 U.S. 820, 96 S. Ct. 1961 (1976); *Canino v. United States Equal Employment Opportunity Commission*, 707 F.2d 468 (11th Cir. 1983); *Newbold v. United States Postal Service*, 614 F.2d 46 (5th Cir. 1980). In his brief plaintiff cites *Penn v. Schlesinger*,

490 F.2d 700 (5th Cir. 1974) (en banc), *cert denied*, 426 U.S. 934 (1976), for the proposition that § 1981 creates a cause of action against the federal government for discrimination in employment. *Penn* was decided prior to the amendment of Title VII to allow suit against the federal government under § 2000e-16. The *Penn* court specifically noted that the federal government was not within the definition of employer under the Civil Rights Act of 1964. 490 F.2d at 701, n.4. If *Penn* represented the law when it was decided, it does not represent the law after Title VII was amended.

The fact that plaintiff's Title VII claim is barred, due to his failure to timely name the proper defendant, does nothing to save his § 1981 claim. As the court noted in *Eastland v. Tennessee Valley Authority*, in dismissing the Title VII claims of ten of twelve plaintiffs for failure to timely file, "the exhaustion and limitation requirements of [§ 2000e-16][can] not be circumvented by bringing federal employment discrimination claims under less demanding statutes such as § 1981." 553 F.2d 364, 371 (5th Cir. 1977). According, plaintiff's § 1981 claims are due to be dismissed.

Plaintiff failed to timely sue the proper defendant in his Title VII action. An amendment to the complaint would not cure this defect since any such amendment would not relate back to the date of original filing. Nor does plaintiff have a separate cause of action under 42 U.S.C. § 1981. Accordingly, plaintiff's motion to amend is due to be denied, and defendants' motion to dismiss or alternatively for summary judgment is due to be granted.

An appropriate separate order will be entered.